UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients,

and

SACHEEN CARR-ELLIS, M.D., M.P.H., on behalf of herself and her patients, **PLAINTIFFS**

vs. **Civil Action No. 3:18-CV-171–CWR-FKB**

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health;

and

KENNETH CLEVELAND, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure, **DEFENDANTS**

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION OF DR. DOBBS AND DR. CLEVELAND

Dr. Dobbs and Dr. Cleveland, official capacity Defendants herein, oppose Plaintiffs' motion for preliminary injunction [Doc. 102] as follows, to-wit:

In March 2019, the Mississippi legislature passed Senate Bill 2116 ("S.B. 2116" or "the Fetal Heartbeat law") and sent it to Governor Bryant, who signed the bill into law on March 21, 2019. A signed copy of S.B. 2116 is attached as Exhibit 1 hereto. The law goes into effect on July 1, 2019, and prohibits the performance of an abortion after a fetal heartbeat, defined as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the

gestational sac," except when necessary "to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." The law makes the performance of an abortion after detection of a fetal heartbeat a misdemeanor under Miss. Code Ann. § 41-41-39 and "grounds for the nonissuance, suspension, revocation or restriction of a [medical] license or the denial of reinstatement or renewal of a [medical] license" pursuant to Miss. Code Ann. § 73-25-29.

Plaintiffs have requested leave to further amend or supplement their complaint in this action to add a challenge to S.B. 2116,[1] and seek a preliminary injunction barring the law from going into effect on July 1. These Defendants oppose the motion for preliminary injunction, which should be denied.

ARGUMENT

Plaintiffs' motion is governed by the familiar four-factor test. To justify the extraordinary relief of a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) substantial threat of an irreparable injury without the relief; (3) threatened injury that outweighs the potential harm to the party enjoined; and (4) that granting the preliminary relief will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). A movant must "clearly establish each of the traditional four preliminary injunction elements." *DSC Commc'n . Corp. v. DGI Tech., Inc*., 81 F.3d 597, 600 (5th Cir. 1996).

The decision to grant a preliminary injunction is the exception rather than the rule. *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 620 (5th Cir. 1985). The

[1] Defendants state their opposition to the motion for leave in a separate filing.

Fifth Circuit has "cautioned repeatedly" that a preliminary injunction is an "extraordinary remedy" to be granted only if the party seeking it has "clearly carried the burden of persuasion" on all four elements. *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005); *see also Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) (preliminary injunction is "an extraordinary and drastic remedy").

I. PLAINTIFFS HAVE NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The State has "a legitimate and substantial interest in preserving and promoting fetal life" that exists from the moment of conception. *Gonzales v. Carhart*, 550 U.S. 124, 145, 158 (2007) ("the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child"). By enacting the fetal heartbeat bill, the State sought to prohibit procedures that destroy the life of a whole, separate, unique, living human being, thus furthering the State's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

In *Roe v. Wade*, the Supreme Court acknowledged that the states "have an important and legitimate interest . . . in protecting the potentiality of human life." 410 U.S. 113, 162 (1973). In *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992), the Court stated flatly "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," and *Gonzales* agreed. 550 U.S. at 146. The plurality in *Casey* specifically rejected the "interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S. at 146. Indeed, Justice Ginsburg argued that the majority in *Gonzales* "blur[red] the line, firmly drawn in *Casey*,

between previability and postviability abortions." *Id.* at 186 (Ginsburg, J., dissenting).

As a matter of science and medicine, life begins at conception. Justice Kennedy acknowledged this indisputable fact in *Gonzales*: "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. When an unborn child has developed a beating heart, it is a sign that the child has begun to "assum[e] the human form." As opposed to a vague and constantly shifting concept of "viability," detection of a fetal heartbeat is an objective milestone, and also an extremely accurate indicator of the likelihood a fetus will survive until birth. *See* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 140-146. "Full term survival, however, is not only seen in the indeterminate state of 'viability.' It can be predictably seen at an earlier point in time. Recent medical research has determined that although the miscarriage rate for all pregnancies may be as high as 30%, once a fetus possesses cardiac activity, its chances of surviving to full term are between 95%-98%. That extraordinary difference is the key in determining ultimate survivability." 74 Ohio St. L.J. at 140 & nn.119-123.

S.B. 2116 also furthers the State's interest in maternal health by preventing deleterious effects of abortion on women which have been recognized by the courts. *Gonzales*, 550 U.S. at 159 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.") (internal citations omitted); *McCorvey v. Hill*,

385 F.3d 846, 851-53 (5th Cir. 2004) (Jones, J., concurring) ("Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions"); *Planned Parenthood v. Rounds*, 686 F.3d 889 (8th Cir. 2012) ("With regard to whether the required disclosure is truthful . . . the State submitted into the record numerous studies published in peer-reviewed medical journals that demonstrate a statistically significant correlation between abortion and suicide. The studies were published in respected, peer-reviewed journals such as the *Obstetrical and Gynecological Survey*, the *British Medical Journal*, the *Journal of Child Psychology and Psychiatry*, the *Southern Medical Journal, and the European Journal of Public Health*").

Like each of the several States, the State of Mississippi has a right to define its interests in the national abortion debate. *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting). The State is not required to remain neutral, and may take sides in the abortion debate, promoting a preference for protecting life and its potential, and profound respect for life within the woman. *Gonzales*, 550 U.S. at 157. Thus, states are not foreclosed from enacting laws to further their interests in the life of the unborn, as well as ensuring respect for all human life. *Gonzales* is the most recent Supreme Court case where the states' interest in protecting unborn life was squarely presented—and in that case the Court *upheld* Congress's decision to totally ban the partial birth abortion procedure based in large part on the legislative conclusion that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Gonzales*, 550 U.S. at 168. The

Court recognized that allowing such procedures to be performed reduced respect for all human life, and performing such procedures could have a negative impact on the physicians performing such procedures. *Id.* at 157.

Plaintiffs argue that because S.B. 2116 necessarily may prohibit some, but not all, pre-viability abortions, the Court should simply strike it down without considering any other issues. [Doc. 102 at 5]. Just as with H.B. 1510, the 15-week law, Defendants disagree.[2] This Court should consider the State's legitimate interests in protecting the life of the unborn, maternal health and safety, as well as the ethics and integrity of the medical profession, in determining the constitutionality of a law which reduces the time period during which a woman may terminate a pregnancy.

It is true that the Supreme Court has held that a state may not "ban" abortion prior to the point of viability: "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Casey*, 505 U.S. at 879). Just as Defendants conceded in previous filings that they were unable to identify any medical research or data that shows a fetus has reached the "point of viability" at 15 weeks LMP, Defendants here necessarily concede that they have been unable to identify any medical research or data that show a fetus has reached the "point of viability" during the 6-12 week LMP time period in which S.B. 2116 would operate. However, S.B. 2116 is not a "ban" of abortion, and Defendants dispute that viability is the only proper consideration in determining its constitutionality.

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[2] Defendants acknowledge the Court's prior ruling on the 15-week law, *JWHO v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. Nov. 20, 2018), but respectfully disagree with that decision and therefore have appealed the permanent injunction of H.B. 1510 to the Fifth Circuit. [Doc. 93].

The Supreme Court has never considered a law regulating abortion at a particular gestational age, nor explained how new medical and scientific evidence and information fits into the existing undue burden framework, or how such evidence must be handled by the lower courts. Since *Casey*, the Court has emphasized that viability is a central issue, but has never held that viability is the *only* consideration. In *Gonzales*, the Court merely "assume[d] for the purposes of this opinion" that viability was still the deciding line, but did not hold that viability was an absolute black-and-white demarcation. *Gonzales*, 550 U.S. at 146.

In *Casey*, the Court explained the *Roe* standard "undervalues the State's interest in the potential life within the woman." *Casey*, 505 U.S. at 873-76. Members of the Court had long recognized that "[t]he *Roe* framework [was] on a collision course with itself," *City of Akron v. Akron Ctr. for Reprod. Health, Inc*., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting), resulting in *Casey*'s acknowledgment that "[b]efore viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her is unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876.

S.B. 2116 Is Not an Abortion "Ban." The categorical approach promoted by the Plaintiffs elevates a woman's right to choose to have a pre-viability abortion to be sacrosanct, surpassing constitutional protections for life, liberty, due process, freedom of religion, and speech. *See, e.g., Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (upholding Oregon law prohibiting possession of peyote and denial of unemployment benefits to members of Native American Church who used drug); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding place and manner restriction

on free exercise of religion); *Stotland v. Pennsylvania*, 398 U.S. 916, 919 (1970) ("States, of course, have the right to place reasonable regulations upon the time, place, and manner of the exercise of the rights of speech and assembly."); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding regulation on manner of speech). No other constitutional right has ever been given this type of exalted, inviolable status, such that even a law which could pass muster under strict scrutiny would be rendered invalid. *See Planned Parenthood of Indiana*, 888 F.3d at 312 (Manion, J., concurring in part and dissenting in part) ("But when contrasted against the absolute nature of the putative right to pre-viability abortion, we see that abortion is now a more untouchable right than even the freedom of speech.").

S.B. 2116 does not "ban" abortion. To start with, a fetal heartbeat is not generally detectable until approximately 6-9 weeks LMP, and it may be as late as 12 weeks depending on the type of ultrasound examination performed. *See* Kathi A. Aultman, M.D., FACOG, *Written Testimony of Before the Ohio House Health Committee on S. B. 23* (Mar. 26, 2019) (citing Mitra, AG, et al., *Transvaginal Versus Transabdominal Doppler Auscultation of Fetal Heart Activity: a Comparative Study*, Am. J. Obstet. Gynecol. (Jul:175(1):41-4 1996))[3]; *Planned Parenthood v. Reynolds*, No. EQCE 83074 at 2-3 (Jan. 22, 2019 Iowa Polk Cty. D. Ct.) ("Dr. Kathi Aultman ... states that the earliest a fetal heartbeat can be detected abdominally is 7 weeks, with most detected by 8 to 9 weeks and some not until 12 weeks into the pregnancy."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015) (fetal heartbeat generally detectable at 6-8 weeks). Thus, S.B. 2116 would not apply to all abortions beginning at 6 weeks (rendering the

[3] A copy of Dr. Aultman's written testimony to the Ohio legislative committee is attached as Exhibit 2 hereto.

term "6 Week Ban" a misnomer), and therefore does not ban women from obtaining abortions. S.B. 2116 *would* require many women to make the decision to have an abortion earlier in pregnancy. However, S.B. 2116 contains a life and health exception, which allows doctors to perform an abortion when the life or health of the pregnant mother is seriously threatened. Exh. 1 at 3, § 41-41-34.1(2)(b)(1).

Because the bill does not ban all abortions, it is distinguishable from the Louisiana law struck down by the Fifth Circuit in *Sojourner T v. Edwards*, 974 F.2d 27, 28 (5th Cir. 1992), which criminalized abortions except under very limited circumstances. Since that time, the Fifth Circuit has not decided a case involving a law which prohibited some but not all abortions, and has not considered a law that restricts abortions based on the existence of a fetal heartbeat or beyond a specific gestational age. Therefore, it remains an open question as to how the Fifth Circuit would rule on the constitutionality of such a law. Instead of banning abortion, S.B. 2116 regulates the time period during which abortions may be performed. As such, it is akin to laws regulating the time, place, or manner of speech, which have been upheld as constitutional. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (rejecting constitutional challenge to time limitation in First Amendment speech case). In the same way that such laws do not "ban" speech, S.B. 2116 does not "ban" pre-viability abortions.

II. PLAINTIFFS HAVE NOT SHOWN A SUBSTANTIAL THREAT OF IRREPARABLE INJURY.

Dr. Carr-Ellis' Declaration is Deficient. In support of their motion, Plaintiffs have submitted a declaration from Dr. Carr-Ellis. However, the declaration is deficient in a number of important respects.

Dr. Carr-Ellis speaks in generalities rather than specifics. She describes general clinical practices for the performance of ultrasounds on pregnant women, but does not specify who performs ultrasounds at the clinic, the types of ultrasounds actually used by the clinic, who makes the determination of which type to use, or the time frame in which each method is used. *See* Pl. Exh. B at ¶¶ 8-12. These issues are important because the type of ultrasound performed, in addition to the skill and experience of the person performing the ultrasound, determines when a fetal heartbeat *may* be detected, which may range from six weeks to as late as twelve weeks LMP. *See supra* pp. 8-9.

In her declaration, Dr. Carr-Ellis states:

> 8. Under Mississippi law, a patient must make two in-person visits to the Clinic in order to obtain an abortion, separated by at least twenty-four hours.[4] *An ultrasound* is performed for each patient at their first visit. An ultrasound is performed for a variety of reasons, including dating the pregnancy and determining whether the pregnancy is located in the patient's uterus. *Ultrasound is also used to detect embryonic or fetal cardiac activity*.
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> 9. The earlier in pregnancy the patient is, the more likely *a clinician* is to use vaginal ultrasound, rather than abdominal ultrasound, to determine the location and gestational age of the embryo. A vaginal ultrasound is inserted directly into the vagina, which creates a clearer image than abdominal ultrasound, to confirm whether the pregnancy is in the uterus and whether cardiac activity is present.
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> 10. The Clinic does not typically perform abortions before 5 weeks, 0 days LMP because, due to the embryo's very small size, it may not be possible to confirm the location of the pregnancy, including using vaginal ultrasound. The standard of care is to

[4] The twenty-four hour waiting period required by Miss. Code Ann. § 41-41-33 allows a woman a brief time to consider all the consequences of having an abortion and make a well-informed decision whether to do so—and the Fifth Circuit confirmed its constitutionality over twenty-five years ago. *Barnes v. Moore*, 970 F.2d 12, 13 (5th Cir. 1992) (rejecting constitutional challenge to informed consent and 24-hour waiting period provisions that were "substantially identical to similar provisions of the Pennsylvania Act at issue in *Casey*"); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 881-87 (1992) (upholding constitutionality of informed consent and 24-hour waiting period requirements).

> confirm a pregnancy is in the uterus before an abortion.
>
> 11. *Using vaginal ultrasound, cardiac activity is generally detectable at approximately 6 weeks, 0 days LMP*. At this point in pregnancy, the embryo is tiny, and embryonic cardiac activity is an electrical impulse that can be see, not hear, on ultrasound. On the ultrasound, the yolk sac looks like a ring, and cardiac activity is a flicker on the edge of the yolk sac.

Pl. Exh. B at ¶ 8 (footnote omitted) (emphasis added).

The declaration thus shows only that some type of ultrasound is performed by the clinic at a woman's initial visit, but does not specify the type. Paragraph 9 states a generality that "a clinician" is "more likely" to perform a vaginal ultrasound early in pregnancy, but does not specify the actual practice of either Dr. Carr-Ellis or the clinic in general. Dr. Carr-Ellis accurately states that a vaginal ultrasound "creates a clearer image than abdominal ultrasound" but does not explain why this is significant: if a vaginal ultrasound is performed, a heartbeat *may* be detectable as early as 6 weeks LMP, but if an abdominal ultrasound is performed, a fetal heartbeat is not generally detectable until approximately 7-9 weeks LMP, and may not be detectable until 12 weeks using a fetal ultrasound. *See supra* pp. 8-9. So if Dr. Carr-Ellis and the clinic perform vaginal ultrasounds every time a woman comes in and reports she is in the early stages of pregnancy, a fetal heartbeat may or may not be detectable at 6 weeks. If only an abdominal ultrasound is performed, it would be approximately 7-9 weeks before the heartbeat could be detected. *See supra* pp. 8-9. Since S.B. 2116 applies only after the heartbeat of the unborn human individual that a pregnant woman is carrying has been detected, the type of ultrasound performed, the skill of the person performing the ultrasound, and whether a heartbeat is actually detected for the embryo or fetus is determinative as to whether the law has any effect on any particular fetus or pregnant woman.

Further, new section 41-41-34.1(2)(c) states:

> *A person* is not in violation of paragraph (a) of this subsection (2) *if that person has performed* an examination for the presence of a fetal heartbeat in the unborn human individual using standard medical practice and that examination does not reveal a fetal heartbeat *or the person has been informed by a physician who performed the examination* for a fetal heartbeat that the examination did not reveal a fetal heartbeat.

Exh. 1 at 3, 41-41-34.1(2) (emphasis added). The crucial determination of whether a fetal heartbeat is detected must be made by either the physician who performs the abortion, or by another physician, who informs the abortion-performing physician. A physician cannot rely on a non-physician "technician" or other "clinician" in this regard—otherwise this defense is inapplicable.

The presence of absence of a fetal heartbeat is a crucial medical determination, because once a fetal heartbeat is detected, the chances of the fetus surviving to full term are 95-98%. *See* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 140-146. (citing S.A. Brigham et al., *A Longitudinal Study of Pregnancy Outcome Following Idiopathic Recurrent Miscarriage*, 14 Human Reprod. 2868, 2868-71 (1999), Aimee Seungdamrong et al., *Fetal Cardiac Activity at 4 Weeks After In Vitro Fertilization Predicts Successful Completion of the First Trimester of Pregnancy*, 90 Fertility & Sterility 1711, 1711-15 (2008)).

Because of the generalities and ambiguities in Dr. Carr-Ellis' declaration, including the failure to specify the techniques and methods actually used by Dr. Carr-Ellis and the clinic to detect fetal heartbeat, it is impossible to determine exactly how many women may be potentially affected by S.B. 2116, and Plaintiffs have failed to meet their burden.

III. THE BALANCE OF HARMS FAVORS DEFENDANTS AND GRANTING THE INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.

Entering a preliminary injunction would deprive the citizens of Mississippi of their strong interest in the full enforcement of duly enacted state laws. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of the laws." *Abbott*, 2013 WL 5857853, at *9 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")). *See also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

Plaintiffs have not met their burden of demonstrating that their interests and the interests of their patients should override the public's interest. Further, in light of the deficiencies of the evidence presented by Plaintiffs, the balance of harms necessarily favors Defendants as well. Plaintiffs' motion should therefore be denied.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

Respectfully submitted, this the 15th day of April, 2019.

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as STATE HEALTH OFFICER OF THE MISSISSIPPI STATE DEPARTMENT OF HEALTH, and

KENNETH CLEVELAND, M.D., in his official capacity as EXECUTIVE DIRECTOR OF THE MISSISSIPPI STATE BOARD OF MEDICAL

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CERTIFICATE OF SERVICE

This is to certify that I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, filed the above and foregoing document via the Court's ECF system, which sent notice of such filing to the following:

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THIS, the 15th day of April, 2019.

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